

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

)	No. 6:96-cv-02430-RTH-PJH
METHANE AWARENESS RESOURCE)	
GROUP, DIESEL COALITION, <i>et al.</i> ,)	DEFENDANTS' MOTION TO
)	CLOSE AND MEMORANDUM
Plaintiffs,)	IN SUPPORT THEREOF
)	
v.)	
)	
UNITED STATES, <i>et al.</i> ,)	
)	
Defendants.)	
)	

MOTION

Defendants, the United States, the Secretary of Health and Human Services (HHS), the Director of the National Institute for Occupational Safety and Health (NIOSH), and the Director of the National Cancer Institute (NCI), hereby move to close this action. Counsel for plaintiffs has been asked whether he opposes this motion but has not responded.

BACKGROUND

This action involves *The Diesel Exhaust in Miners Study* (Diesel Study), a “20-year large scientific study” conducted by NIOSH and NCI. Ex. 28 at 1.¹ Completed in March 2012, the Diesel Study “was done to further understand whether breathing in diesel exhaust fumes could lead to lung cancer and other health outcomes.” *Id.*

“Between 1992 and 1995, NIOSH and NCI developed a draft protocol for the study.”

Akzo Nobel Inc. v. United States, 478 F. App’x 126, 128 (5th Cir. 2012). In 1996, HHS decided to use a particular advisory committee, the NIOSH Board of Scientific Counselors (BSC), “to provide peer review for the draft protocol.” *Id.* In October 1996, “a coalition of mine

¹ References to exhibits are to the exhibits to this motion.

operators,” the Methane Awareness Resource Group, Diesel Coalition (MARG Coalition); certain members of the MARG Coalition; and two miners commenced this action. ECF No. 1

¶ 2. Plaintiffs allege in this action that HHS “violated the Federal Advisory Committee Act (‘FACA’) by using BSC to review the draft protocol.” *Akzo*, 478 F. App’x at 128.

Following certain proceedings in this Court, the Fifth Circuit held in April 1999 that HHS had violated FACA by “mistakenly fil[ing] the charter for BSC with the House Committee on Commerce, rather than the House Committee on Education and the Workforce (the ‘House Committee’).” *Akzo*, 478 F. App’x at 128 (discussing *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999)). To remedy that violation, the Fifth Circuit directed this Court to “fashion an injunction that promoted FACA’s goals of ensuring public accountability and of reducing economic waste.” *Id.* The resulting remedial order (2001 Order) was issued on June 5, 2001.

See id. The 2001 Order provides:

1. * * * * Defendants remain required to provide the [House Committee] with all documentation of the [BSC’s] peer review of the diesel study protocol, including revisions to the protocol made in response to the BSC’s peer review, with a cover letter explaining why such information is being submitted. Defendants shall provide Plaintiffs with copies of all documents submitted to the Committee in compliance with this Order.

2. Defendants shall submit to the [House Committee] all Diesel Study data requested by the Committee, as well as all draft reports, publications, and draft results or risk notification materials prepared in connection with the Diesel Study. * * * * Defendants shall refrain from publicly releasing information submitted to the Committee until 90 days after it is submitted to the Committee.

ECF No. 94.

Work on the Diesel Study continued following the issuance of the 2001 Order. *Akzo*, 478 F. App’x at 129. “In or about 2009, HHS split the study into seven draft [papers] and decided to submit the draft [papers] to scientific journals for peer review.” *Id.* at 130. Following certain proceedings in this Court, the first four papers were published in September 2010. *Id.* “By May

2011, the study's final three papers were almost ready for publication." *Id.* at 131. Following certain additional proceedings in this Court and in the Fifth Circuit, the final three papers were published in March 2012. Ex. 29 at 1-2. By letter dated September 5, 2013, HHS submitted the "worker notification material prepared by [NIOSH] in connection with [the Diesel Study]" to the House Committee for the 90-day review period specified in the 2001 Order. Ex. 30.

By minute entry dated September 16, 2013, this Court directed the parties to "update the Court as to the status of this case" and said: "If all issues have been resolved, the parties shall file a motion to close this matter." ECF No. 174.

DISCUSSION

In March 2012, NIOSH and NCI completed the Diesel Study by publishing the study's final three papers. *See* Ex. 28 at 1. In May 2012, the Fifth Circuit held that the 2001 Order should be "narrowly construe[d]" because "the underlying FACA mistake was, at most, administrative" and that any expansion of the terms of the 2001 Order to impose additional requirements on defendants constituted "an abuse of discretion." *Akzo*, 478 F. App'x at 137. In September 2013, HHS complied with the sole remaining requirement of the 2001 Order by submitting to the House Committee the worker notification materials for the Diesel Study that NIOSH had prepared. Ex. 30. In view of these facts, nothing under FACA or the 2001 Order remains to be litigated with respect to the Diesel Study. Because "all issues" in this action have thus "been resolved," *see* ECF No. 174, this action should be closed.

CONCLUSION

For the foregoing reasons, defendants' motion to close should be granted.

Respectfully submitted,

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Dated: September 23, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2013, I served the within motion and memorandum, the exhibits submitted with the motion, and the proposed order on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass